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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 15 1995

In the Matter of	)	
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Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252

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To: The Commission

OPPOSITION OF PITTENCRIEFF COMMUNICATIONS, INC.

Pittencrieff Communications, Inc. ("PCI" or the "Company"), by its attorneys, pursuant to the provisions of Section 1.115(d) of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") hereby submits its Opposition to the Petitions for Review of CMH, Inc. and CelSMer (collectively ("CMH") and RAM Mobile Data USA Limited Partnership ("RAM").[1] CMH and RAM ask that

[1] Section 1.115(d) of the regulations states that Oppositions to Applications for Review shall be filed within 15 days after the Application for Review is filed. The time for the submission of Applications for Review did not expire until December 8, 1995, the date on which CMH filed its Application for Review. However, RAM submitted its Application for Review on November 20, 1995. Accordingly, the rules would have required PCI to submit an Opposition to the RAM Application before the date passed for the submission of other Applications for Review. In order to submit this consolidated Opposition, PCI requested an extension, until December 15, of the time to submit an Opposition to the RAM Petition, and any other Petitions that would be submitted. As noted in that Motion for Extension of Time, submitted on December 5, 1995, counsel for RAM has interposed no objection to PCI's submission of an Opposition by December 15.

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the Commission review the Second Erratum issued in the above referenced proceeding on November 8, 1995.

I. INTRODUCTION

PCI is a leading provider of SMR services in the United States with approximately 74,000 subscriber units in service. The Company serves SMR customers on approximately 3,200 800 MHz SMR channels providing coverage in Texas, New Mexico, Oklahoma, Arizona, Colorado, North Dakota and South Dakota. PCI has entered in to a transaction with Advanced MobileComm, Inc. and related entities (collectively, "AMI") under which PCI will, either through transfer of control or assignment, operate various SMR systems formerly licensed to AMI. After the transaction with AMI is complete, PCI expects to have approximately 93,000 subscriber units serviced on over 4,300 granted SMR channels in a footprint containing approximately 29 million people.

PCI did not submit Comments and Reply Comments in the phase of this proceeding which led to the adoption of the Second Order on Reconsideration and Seventh Report and Order (the "Second Order")[2] which the Second Erratum clarifies. Nevertheless, PCI recently submitted a Petition for Reconsideration of the Third Order on Reconsideration[3] in this proceeding concerning a related matter. Further, PCI has been an active bidder in the auctions for 900 MHz specialized mobile radio ("SMR") spectrum. In addition, through its transaction with AMI, PCI will be assigned from

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[2] Second Order on Reconsideration and Seventh Report and Order PR Docket No 89-553, *et al.*, released September 14, 1995.

[3] Third Order on Reconsideration, FCC Docket No. 89-553, *et al.*, released October 20, 1995 ("Third Order").

AMI 900 MHz SMR licenses in the San Diego area. The rules governing the coverage requirements for 900 MHz Major Trading Area ("MTA") SMR licensees are, therefore, critical to PCI, both as a potential MTA licensee as well as a putative holder of a license in an existing Designated Filing Area ("DFA"). Because the rules clarified in the Second Erratum affect PCI's ability to meet its coverage requirements, PCI is an interested party in this proceeding.

The rules clarified in the Second Erratum will assist 900 MHz licensees in meeting their coverage requirements. Those rules are consistent with the Commission's intent to allow licensees to meet those requirements regardless of the presence of incumbent licensees. Accordingly, the Second Erratum is a consistent interpretation of an ambiguously worded regulation. CMH and RAM assert that the Second Erratum is such a significant departure from the regulations that the Commission's action must be considered a substantive rule change. PCI disagrees and urges the Commission to let the Second Erratum stand. Accordingly, the Commission is respectively asked to dismiss the Applications for Review submitted by CMH and RAM. PCI is pleased, therefore, to have this opportunity to submit an Opposition to the RAM and CMH Applications for Review.

II. DISCUSSION

Section 90.665(c) of the regulations, as originally adopted, stated that 900 MHz SMR MTA licensees must construct and place into operation a sufficient number of base stations to provide coverage to one third of the population of the MTA by the end of three years from the initiation of the license term. It further provided that at the end of

five years from licensing, the licensee was required to provide service to two thirds of the MTA population. At the end of the five year term, the licensee could submit a showing to the Commission demonstrating that they were providing "substantial service." The regulations were silent as to the ability of the licensee to submit such a showing at the end of three years.

In the Second Erratum, the Commission clarifies the ability of licensees to take advantage of the "substantial coverage" alternative at the three year coverage benchmark. It stated that in lieu of providing service to one third of the population of the service area within three years, an MTA licensee could, alternatively "provide written notification that has elected to show substantial service to the MTA five years from license grant."

RAM and CMH argue that this change represents an impermissible departure from the regulations in place at the time and that such departure could not be accomplished without further notice and comment rule making. PCI disagrees. The Second Erratum is consistent with the Commission's intent to allow licensees a meaningful alternative to the coverage requirements through the use of a "substantial showing." Further, the Second Erratum does not eviscerate the intent of the coverage requirements to ensure that licensees do not warehouse spectrum. Finally, licensees' ability to use a "substantial showing" both at three and five years is consistent with the approach taken by the Commission in other services.

The "substantial service" alternative is designed to allow licensees an alternative to meeting the strict wording of the coverage requirements. In the Third Order in this

proceeding, adopted before the Second Erratum, the Commission made it clear that the "substantial service" alternative was a means by which specialized users could meet the coverage requirements. It cited two possible examples of individualized circumstances which could warrant a showing of "substantial service." Importantly, the Commission stated that "The coverage requirement is not intended to act as a deterrent to seeking MTA licensees, and we believe that with the 'substantial service' mechanism, we have provided sufficient flexibility for new entrants to provide new services or to serve now unserved populations in all of the licenses."[4]

PCI admits that the decisional documents and the regulations inartfully indicate that the "substantial service" alternative should apply at both the three and five year benchmarks. However, the clarification of the Second Erratum is not a departure from the Commission's discussion of this topic. In the Second Report and Order and Second Further Notice of Proposed Rule Making[5] the Commission stated:

> We will require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years. Alternatively, at the five year mark, MTA licensees may submit a showing to the Commission demonstrating that they are providing substantial service. [emphasis added][6]

The Commission did not specify that the "substantial service" alternative substituted only for the five year coverage requirement. Instead, PCI submits that the alternative

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[4] Third Order at ¶ 2.

[5] Second Report and Order and Second Notice of Proposed Rule Making, FCC Docket No. 89-553, *et al.* 10 FCC Rcd. 6884 (1995). ("Second Report and Order").

[6] Second Report and Order at ¶ 40.

presented in the Second Report and Order was designed to substitute for both the three and five year coverage requirements.

A contrary interpretation, that the "substantial service" option is available only at the five year benchmark, would render the Commission's intent in providing this alternative meaningless. A strict requirement that licensees must show coverage to one third of the population after three years, with no alternative to demonstrate that they either are or will provide "substantial service" eliminates the benefits of the "substantial service" alternative. Contrary to the Commission's intent, application of such a strict coverage requirement would "act as a deterrent" to seeking MTA licenses and would not provide sufficient flexibility for new entrants to provide new services or to serve now unserved populations.

The ability to rely upon a five year "substantial service" demonstration at the end of three years is particularly important in instances where there are currently two Designated Filing Area ("DFA") licensees in an MTA. In those instances, it may be difficult for the MTA licensee to meet the one third coverage requirement because of the presence of the incumbent licensee; yet the licensee can, as the Third Order suggests, still provide "substantial service" to the remainder of the MTA. This inability to meet the one third or two thirds coverage requirement exists even if the MTA licensee is currently the DFA licensee. Those MTAs in which there are potentially two DFA licensees are:

MTA Number	MTA Name	Included DFAs
MTA 01	New York	New York City, Hartford
MTA 02	Los Angeles	Los Angeles, San Diego
MTA 06	Charlotte	Charlotte, Greensboro
MTA 13	Tampa	Tampa, Orlando
MTA 23	Richmond	Richmond, Norfolk
MTA 35	Buffalo	Buffalo, Rochester

Because of the potential inability of MTA licensees, even if they are the incumbent licensee, to meet the coverage requirements at the end of three years in these areas, it is important that the five year "substantial service" alternative be available at that time.

The clarification contained in the Second Erratum does not, as RAM and CMH suggest, eviscerate the FCC's intent that licensees not warehouse spectrum. As both point out, the coverage requirements are designed to ensure that the spectrum is used to serve the public. Nevertheless, the Commission has consistently found that the "substantial service" alternative meets the anti-warehousing goal. The Second Erratum does not change that intent. At the end of the five year construction period, the MTA licensee will provide "substantial service." Because the Commission never stated a particular intent to prevent warehousing at the end of three years, as opposed to the end of the five year license term, the Second Erratum does not change the ultimate FCC goal of ensuring that the spectrum is effectively employed.

Finally, the adoption of the Second Erratum is consistent with the coverage requirements for other services. In no other service does the Commission mix a coverage requirement with a "substantial service" alternative. Accordingly, the "substantial service" test should apply at both the three and five year benchmarks. In

the personal communications services ("PCS"), for example, the substantial service test is available at the single coverage requirement for 10 MHz licensees.[7] There, the Commission does not impose both a coverage and substantial service test. In the Second Report and Order, the Commission specifically stated that the 900 MHz SMR coverage requirements were designed to mirror the 10 MHz broadband PCS rules. The same structure should apply to 900 MHz SMR service. The "substantial service" test would be rendered largely meaningless as an alternative to the coverage requirement if the coverage requirement is still applicable.

III. CONCLUSIONS

The Applications for Review of RAM and CMH are based on interpretation of the coverage requirements that are inconsistent with the Commission's intent and with the coverage requirements of other commercial mobile radio services ("CMRS"). In no other service does the Commission allow licensees to demonstrate coverage through a "substantial service" demonstration, but also require an interim population coverage requirement. Accordingly, the Applications for Review of RAM and CMH should be dismissed.

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[7] See 47 C.F.R. 24.203(b).

WHEREFORE, THE PREMISES CONSIDERED, Pittencrieff Communications, Inc. submits the foregoing Opposition and requests that the Commission dismiss the Applications for Review submitted by RAM and CMH.

Respectfully submitted,

PITTENCRIEFF COMMUNICATIONS, INC.

By: _____

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Dated: December 15, 1995

CERTIFICATE OF SERVICE

I, Donna B. Fleming, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 15th day of December, 1995, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing **Opposition of Pittencrieff Communications, Inc.** to the following:

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